SUPREME COURT, U. S.

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

NO. 73-905

UNITED STATES OF AMERICA,

Appellee,

vs.

HAZEL M. TALBERT,

Appellant.

MOTION FOR RECONSIDERATION

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PART I

STATEMENT OF THE ISSUE

The Appellant contends that the sentence imposed on him is unconstitutional. This contention is based on two different grounds.

(a) The Appellant contends that the *procedure* by which he was sentenced was constitutionally defective in that the trial court punished him for pleading "not guilty" more severely than it punished co-defendants who pleaded guilty.

This is a ground of attack which has been specifically approved by this Court in previous decisions which state that improper considerations by a trial court used in sentencing amount to a denial of due process.

(b) The Appellant contends that his sentence is substantively unconstitutional because of its severity in

relation to the sentences received by co-defendants for the same crime.

This is a ground of attack which this Court has traditionally not accepted. However, some federal courts of appeals have allowed such an attack to be successfully made, and this Court seemingly has done so in its decision in *Furman v. Georgia*, 408 U.S. 238, outlawing the death penalty.

We ask the Court not only to apply accepted procedural standards to this case but also to review the (seeming) policy that the severity of a sentence per se cannot be the subject of appellant review.

PART II

SUMMARY STATEMENT OF FACTS

The Appellant was convicted on five counts of "aiding and abetting" in the illegal cashing of stolen Travelers' checks (each count was on a separate $10.00 check for a total of $50.00) and sentenced to serve three years imprisonment. The offenses, basically, occurred at one time. The "aiding and abetting" involved two other co-defendants charged with the same five counts. One of the co-defendants, Charles Otis Durden, pleaded "guilty" to one count, had the other four counts nol prossed, and was sentenced to a probationary term. The other co-defendant, Weldon Odel Jett, originally pleaded "Not guilty," moved to suppress certain of the government's evidence, and, when that motion was denied, changed his plea to "guilty" of one count and had the other four counts nol prossed. Jett was sentenced to 18 months imprisonment.

The background of the three co-defendants was

strikingly similar. All of them were of college age, single, lived in a college environment (Talbert, while living with college age youths did not actually attend college but had a full time job instead), had absolutely no prior criminal record or activity, and had nothing in their background to indicate either any prior undesirable activities nor any proclivity for future illegal conduct.

The indictment was returned almost two years after the illegal act had taken place. All three defendants had all but forgotten about the incident, and all had led exemplary lives since the incident, and had done so out of no fear or compulsion concerning this case but had done so as their accepted and standard way of life.

The Appellant has contended (and the government has never disputed this contention) that there is no dissimilarity whatsoever between any of the three co-defendants either as to background, degree of participation in the crime,[1] or freedom from any illegal activity since the crime.

The Appellant contends (and the government has never disputed this contention) that his sentence was more severe than the other co-defendants for the sole reason that he pleaded "not guilty" and was convicted by a jury. The following chart shows the only dissimilar features of these three co-defendants in this entire case:

(a) Durden—pleaded guilty—received probated sentence.

(b) Jett—pleaded not guilty—made pre-trial motion to suppress which was denied—changed

[1] If anything, the Appellant's participation was less than that of the other two co-defendants. However, as an "aider and abettor" their conduct is attributable to him, and, thus, his acts are the same as theirs.

his plea to guilty—sentenced to serve 18 months.

(c) Talbert—pleaded not guilty—convicted by jury—sentenced to serve 3 years.

PART III

CONSTITUTIONAL PROVISIONS RELIED UPON

"No person should be . . . deprived of life, liberty . . . without due process of laws . . ."

Amendment Five to the
Constitution of the
United States

"Excessive bail shall not be required and excess fines imposed, nor cruel and unusual punishment inflicted."

Amendment Eight to the
Constitution of the
United States

PART IV

ARGUMENT AND CITATION OF AUTHORITIES

A.

IS IT CONSTITUTIONALLY PERMISSIBLE TO ASSESS A MORE SEVERE PUNISHMENT ON A DEFENDANT BECAUSE HE PLEADS NOT GUILTY THAN WOULD HAVE BEEN IMPOSED BY A PLEA OF GUILTY?

As to the question of whether or not an appellate court can review a sentence on the procedural aspects of imposition of a sentence, there seems to be no doubt and it is now a settled question that the courts can

review any sentence imposed which violates the due process aspects of the Federal Constitution:

Townsend v. Burke
334 U. S. 736

Williams v. New York
337 U. S. 241

Green v. U. S.
365 U. S. 301

North Carolina v. Pearce
395 U. S. 711

U. S. v. Tucker
404 U. S. 443

and, of course,

Furman v. Georgia
408 U. S. 238

The question remaining is—is it Constitutionally permissible (i.e., a denial of due process) to increase a sentence imposed based on the fact that the defendant pleaded "not guilty" and insisted on a trial as opposed to entering a plea of guilty? We maintain that this is not a valid consideration in the sentencing of criminal defendants, and that is the first issue presented in this Motion for Rehearing.

At the oral argument before the Fourth Circuit, that Court stated that this was a valid consideration which the trial judge could evaluate and use in passing sentence.

> *Haldi:* "Now, we have raised the question of sentence. It is my understanding that all three of Your Honors have sat as District Judges. I have been reading, recently, a book and in my inept way I have lost it about half-way through the book.

The book is entitled 'Criminal Sentencing,' and it is very critical of the lawyers, of the trial courts and of the Appellate Courts in our sentencing process, and perhaps the reason the book is remarkable is that it's written by a United States District Judge in New York, Judge Kauffman. Judge Kauffman says the sentencing procedure is perhaps the most important or one of the most important in the entire trial processes, and he indicates that trial judges give him the most trouble. And he indicates that in his experience it's the type of thing that weighs very heavily on a Judge, and yet there are very few guidelines. The government relies on the adage again that the sentence is almost entirely within the discretion of the trial court. I would like to submit, Your Honors, that this is an idea whose time, if it has not come, is coming. And I think we have to—in this case is a perfect example—four young men involved in a—and again I'm assuming that Mickey Talbert is guilty for the point of argument at this point of time—four young men, 22 years of age and around the college age, they come up charged with identically the same crimes. One boy pleads guilty, gets probation. One boy initially pleads not guilty, goes through some motions, but ultimately changes his plea to guilty and gets 18 months. Another boy pleads not guilty, he's tried and gets three years. Now, as a matter of fact in our case, we have introduced in the trial the character of our witness. There's not a crime of violence, total of $50.00 involved in cashing five Travelers' checks over a period of time that my client was convicted of. And we simply ask where is the rationale in sentencing? There must be some rationale in sentencing, just as there has to be rationale in the trial process."

Judge: "Well, isn't it obvious here what it was?"

Haldi: "Your Honor, the only thing it seems to me is that he got penalized for going to trial."

Judge: "No. The other way of looking at it is the other two got the benefit of their admission of guilt which is the first step in the rehabilitative process."

Haldi: "That's another way of saying he got penalized for pleading not guilty."

Judge: "Well, you can state it in converse that way. But I think if you state it affirmatively, the way I do, that this is the ground and it is a perfectly acceptable ground. You don't punish people just for the sake of vengeance, Mr. Haldi. You punish them for two purposes—the first, and this is highly problematical, not everybody subscribes to this, because of the deterrent effect on others who might be inclined to commit the same crime. The other and more important rationale of punishment is the rehabilitative aspect. And you don't begin to rebuild, you don't begin to rehabilitate until you get firm recognition in the subject that he did wrong, that he was guilty. Now, as soon as accused, or at least prior to trial, the other two come forward and make this admission, then this provides a basis on which the District Judge can conclude that the sentence to be imposed on them need not be as harsh as that which might be imposed on another defendant who has the same degree of culpability, roughly the same background, roughly the same record or lack of record, but who nevertheless, even though he is guilty, is unwilling to admit his guilt."

Haldi: ". . . what Mickey Talbert has done to be punished for is no greater than what they've done, but as Judge Widner suggests what he's done to be punished for is that he's refused to admit and plead guilty."

Judge: "He's put himself in the place as Judge Widner says so that the Trial Judge could not say

> that he had commenced his rehabilitation process and he needed to be confined." [2]

Therein lies the issue which we ask this Court to decide and we feel that further elaboration will only obscure the point. Our only concern at stopping at this place in the argument is the fear of many trial attorneys that the failure to argue a point by numerous citations and other arguments indicate a lack of confidence and or enthusiasm for the point. For that reason alone, it is difficult to stop here, and we make only the statement that this point is urged with our maximum sincerity.

B.

MAY AN APPELLATE COURT REVIEW THE SEVERITY OF A SENTENCE WHICH IS WITHIN THE STATUTORY LIMITS?

This second question is more dramatic in the sense that it seems not to have been answered finally. Any review of the cases and commentaries in this area must lead to the conclusion that while appellate courts in the past have indicated that there is no appellate review of a sentence within the statutory limits on the grounds of excessiveness, later decisions have greatly eroded this concept and the future seems sure to provide that appellate review is coming as surely as the dawn.

Truly, this is an idea whose time is in the process of coming. We only hope that it comes in time to salvage

[2] The passage above quoted came from a tape recording made by the Fourth Circuit Court Reporter. Since edited transcripts of taped conversations are not much in favor in some quarters, the original tape recording has been deposited with the Clerk of this Court. This tape was not in our possession at the time of the filing of the original application for Certiorari.

the future of this Appellant, and that he does not become one of those unfortunate discards of society who while helping to effect change was nevertheless made to pay the penalty of the old system.

BACKGROUND OF APPELLATE REVIEW

Prior to 1891, there is no dispute that the federal appellate courts were empowered to review and modify sentences (Act of March 3, 1879. Ch. 176,§3, 20 Stat. 354, *U.S. v. Lynn*, 11 F. 57, *Bates v. U.S.* 10 F. 92). However, by the Act of March 3, 1891 (Ch. 517 §11, 26 Stat. 829), somewhat different language was enacted which enabled the Ninth Circuit to announce that the Federal Appeals Courts had lost the power to review sentences. [*Freeman v. U.S.* 243 F. 353, cert. denied 249 U.S. 600 (1919)].

The Freeman opinion is much unloved by commentators[3] (and, presumably, by defendants) and was certainly not a mandatory construction of the statute of 1891.

The Congress has also attempted many enactments to overrule *Freeman* but none have been successful so far.[4]

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[3] See, for example, *Appellate Review of Sentences And The Need for a Reviewable Record*, Duke Law Journal, January 1974, Vol. 1973 No. 6, p. 1357-1376, on p. 1359. The author characterizes this as ". . . the dubious statutory construction in *Freeman* . . ." and on p. 1358 speaks of ". . . the judge made rule against sentence review."

[4] E.g. S. 1540, 90th Cong. (1967) H. R. 6188 91st Cong. (1969) S. 1561, 91st Cong. (1969) H. R. 5180, 91st Cong. (1969) S. 2228, 92nd Cong. (1971) S. 2228, 92nd Cong. (1971).

The *Freeman* decision is the fountainhead for numerous statements such as this:

> If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by statute.
>
> *Gurera v. U.S.*
> 40 F. 2d 338, 340-341

Judge Irving Kauffman of the United States Court of Appeals for the Second Circuit made this statement in 1962:

> "The United States is the only nation in the Free World where one judge can determine conclusively, decisively and finally the minimum period of time a defendant must remain in prison, without being subject to any review of his determination." [5]

If these sweeping pronouncements had been uniformly followed, there would be no need to go further, but many exceptions (particularly several recent and notable decisions) occur, and therein makes the constitutional test for this principle, and one exceptionally suited for certiorari since many of the circuit courts have expressed absolutely contradictory rules in this regard.

The following cases have reviewed the sentence imposed on a criminal defendant (all of them "legal" sentences in the sense of being within the statutorily

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[5] Appellate Review of Sentences: A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit, 32 F.R.D. 249, 260-61.

prescribed range) and reversed on the ground (either expressly or impliedly) that the sentence is excessive.

Millich v. U. S.
282 F. 604 (Ninth Circuit 1922)

(The Court expressly stated that an appellate court *has the right to* review and modify a sentence.)

U. S. v. Wiley
278 F. 2d 500 (3-5)
(Seventh Circuit 1960)

(Here again the Court expressly stated that it has the power to review sentences.)

Leach v. U. S.
320 F. 2d 670 (D.C.C.A., 1963) (First Appeal)

Leach v. U. S.
334 F. 2d 945 (D.C.C.A., 1964) (Second Appeal)

Frady v. U. S.
348 F. 2d 84 (D.C.C.A., 1965)

Coleman v. U. S.
357 F. 2d 563 (D.C.C.A., 1965)

(In this case, Tamn, Danaher, and Burger dissented stating that an appellate court was without authority to revise a lawful sentence. Here again, not only do some courts differ as to what an appellate court can do, but there is much debate between the judges themselves as to what power of review an appellate court possesses.

U. S. v. McKinney
427 F. 2d 449 (Sixth Circuit 1970) (First Appeal)

U. S. v. McKinney
466 F. 2d 1403 (Sixth Circuit, 1971, 1972) (Second Appeal)

(Sentence expressly set aside as excessive.)

U. S. v. Daniels
467 F. 2d 967 (Sixth Circuit, 1971) (Rehearing En Banc denied)

(Sentence expressly set aside as excessive.)

U. S. v. Wilson
450 F. 2d 495 (Fourth Circuit 1971)

(The Court stated that it had no power to review the sentence, still it "scrutinized" the sentence and remanded it.)

We also point out the facts found by the Fourth Circuit in the *Wilson* case which are identical with this present appeal.

The case involved a youthful offender (23 years of age) who forged an endorsement on a government check. The amount in controversy was less than $100.00. The sentence was three years. There was no past criminal background of the defendant. The trial court did not consider sentencing under the Youth Corrections Act.

In the *Wilson* case, the Fourth Circuit reviewed the sentence and found it excessive. In this case, the Fourth Circuit did not even review the sentence.

Woosley v. U. S.
478 F. 2d 139 (Eighth Circuit, 1973) (En Banc decision, three dissents)

The Court's first sentence stated: "The federal courts have *uniformly* agreed that 'a sentence imposed by a

district judge, if within statutory limits, is generally not subject to review." (p. 141, emp. supp.) The Court then went on to review the sentence, and to set it aside as excessive.

While the decisions of the Supreme Court seem less inclined to specifically state that they are reviewing the excessiveness of the sentence, sentences have been reviewed and cases reversed based on the sentence:

U. S. v. Yates
356 U. S. 363

Hill v. U. S.
368 U. S. 424

Weems v. U. S.
217 U. S. 349

Townsend v. Burke
334 U. S. 736

Williams v. New York
337 U. S. 241

U. S. v. Tucker
404 U. S. 443

(Holding no appellate review of sentence, went on to reverse on the matter of the sentence *procedure*.)

North Carolina v. Pearce
395 U. S. 711

And, of course,

Furman v. Georgia
408 U. S. 238

In *Johnson v. Beto*, 337 F. Supp. 1371 (1972) a federal district court reviewing a Texas State court conviction and sentence on a habeas corpus application reversed based (in part) upon a legal conclusion that an excessive sentence showed a lack of due process during the trial.

Thus, while most federal courts (including the district courts on habeas corpus proceedings) state that there is no review of a criminal sentence within the legal limits, many cases appear which do precisely that—some do it directly and some indirectly. However, the fact that most courts feel that they are not empowered to make such a review makes this especially a matter for certiorari because some other courts *are* reviewing sentences.

Respectfully, this is a matter which should be settled.

It may be settled rather simply. 28 U. S. C. 2106 states:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry or such appropriate judgment, decree, or order or require such further proceedings to be had as may be just under the circumstances.

While this language would seem to be dispositive of the matter, the appeals courts have stated that it does not apply to criminal sentences and that only the Supreme Court can change this interpretation (*Smith v. U. S.* 273 F. 2d 462, 467-468. However, see dissent of Judge Murrah, 468-469).

The appellate courts also rely heavily on the denial of certiorari by the Supreme Court in cases which dearly have cried for guidance from this court. See *U. S. v. Rosenberg*, 195 F. 2d 583, 604-609.

EPILOGUE

There is no doubt that sentencing is one of the last great murky areas of our criminal law which has not

received exploration by modern standards. It is a matter which has troubled judges and commentators for years now and it seems to be on the verge of becoming a national outcry. Even a United States District Judge has been moved by what he considers an outrageous *system* to write a compelling little book on the subject.[6] This book has received much attention in the legal periodicals.[7]

The lower courts themselves have addressed this problem. See:

> *Pilot Institute on Sentencing* (Under the auspices of the Judicial Conference of the United States) held July 16 & 17, 1959, reported in 26 F.R.D. 231
>
> *Appellate Review of Sentences* (A symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit). September 24, 1962, reported in 32 F.R.D. 249
>
> *Appellate Review of Sentences* (address of Hon. Les Brewster, Judge, United States District Court, N.D. Tex., before Judicial Conference of the Ninth Circuit, July 15, 1965, reported in 40 F.R.D. 79
>
> *Excerpts From the Proceedings of the Institute on Sentencing for United States Judges of the District of Columbia Circuit*, November 1968, reported in 54 F.R.D. 285

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[6] CRIMINAL SENTENCES: LAW WITHOUT ORDER by U.S. District Judge Marvin E. Frankel (Hill and Wang, 1973).

[7] E.g. *University of San Francisco Law Review*, Fall 1973, p. 214; *Cornell Law Review*, Vol. 59, No. 1, November 1973, p. 177; *Vanderbilt Law Review*, Vol. 26, No. 6, November 1973, p. 1349; *Harvard Law Review*, Vol. 87, No. 3, January 1974, p. 687; *Fordham Urban Law Journal*, Vol. II, No. 1, Fall 1973, p. 169.

Law review articles,[8] cases, proposed statutes, books and statements by federal judges all come back to the basic point:

Undoubtedly, sentencing is one of the most vital and crucial stages of a criminal proceeding. Why should this stage be exempt from any type of appellate review when appellate review is available for practically every other aspect of our judicial system, criminal and civil?

We are not here arguing for absolute uniformity in sentencing. However, we do not deny that the need has become apparent because of widely disproportionate sentences *given throughout* the trial courts. What we do ask is simple:

> "If sentences may be subjected to appellate scrutiny, the compilation of a reviewable record of the sentencing [9] decision would appear to be mandated."

If a trial court must make findings of fact on a disposition of even the most trivial "civil matter," why not as to a sentence he imposes? Why not a finding of why the defendant is not a subject for probation or why the Youth Corrections Act should not apply, or why the defendant is given a longer sentence than co-defendants?

The failure to expressly spell out and answer these questions means that sentencing is without any guidelines whatsoever. There is no doubt that a statute

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[8] Appellate Review of Sentencing: A New Dialogue, University of Colorado Law Review, Vol. 45, 1973, pp. 209-228, Appellate Review of Sentences and the Need For A Reviewable Record, Duke Law Journal, Vol. 1973, pp. 1357-1376.

[9] Appellate Review of Sentences and the Need For A Reviewable Record, op. cit. p. 1358.

without reasonably specifying the prescribed conduct fails for want of due process. Why then should a sentencing procedure not be subject to some of the same objective standards or be wanting in due process?

Charles Fahy, Senior Judge, U. S. Court of Appeals (District Col.) in reviewing Judge Frankel's book, LAW WITHOUT ORDER, in the Cornell Law Review [10] states:

> Sentences, like the exercise of discretion elsewhere should be reviewable to determine the proper application of relevant factors prescribed by law and for abuse of discretion . . . I have long been convinced of the need for review of sentences, although not so thoroughly convinced it should be by courts of appeals rather than by some other body composed for the purpose. I do believe however, the most feasible step toward review to be by the courts of appeals. (pp. 178, 179)

A final comment on *Furman v. Georgia* seems appropriate even though there does not seem to be any single reason for the majority's opinion. Justices Brennan and Marshall both quote with approval this portion of Justice Field's dissert in *O'Neil v. Vermont* (144 U. S. 323 at 339-340)

". . . [The Clause] is directed . . . against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged. The whole inhibition is against that which is excessive . . ."

Justice Brennan cites *Weems v. U. S.*, 349 approvingly, a case which reversed a too severe sentence.

Justice Douglas stated:

"Any law which is nondiscriminatory on its face

[10] Vol. 59, No. 5, November 1973.

may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment." (p. 257)

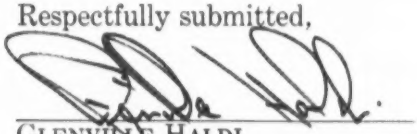
A sentencing law may be applied as discriminatorily in cases involving prison terms as well as cases involving the death penalty. Is the enormity of the death penalty the fact that stirs the Court to review its imposition or is it the fact that it is applied discriminatorily and unconstitutionally?

CONCLUSION

Errors in sentencing are exclusively the work and realm of the judiciary. That excessive and unjust sentences are imposed can hardly be doubted. The monstrous aspect of it is that the judiciary has refused to even review these actions.

We respectfully ask this Court to state that sentences can be reviewed by appellate tribunals.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

I, GLENVILLE HALDI, of counsel for the Appellant, Hazel Mickey Talbert, do certify that this Motion for Reconsideration is presented in good faith and not for the purpose of delay and I further certify that the Motion for Reconsideration is presented in accordance with Rule 58 of this Honorable Court.

This 7th day of June 1974.

GLENVILLE HALDI
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CERTIFICATE OF SERVICE

I certify that I have this date, according to Rule 33 of the Rules of the Supreme Court of the United States, served counsel for the United States of America with three copies of the Motion for Reconsideration herein by depositing same in the United States mail, with adequate first class postage addressed to:

The Solicitor General
Department of Justice
Washington, D. C. 20530

This 7th day of June 1974.

GLENVILLE HALDI
Attorney for Appellant